BRF129

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JESUS BAZAN, JR., MANUEL ALEMAN
and GRACIELA FLORES,
Petitioners

VS.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ATTORNEYS FOR PETITIONERS

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FIRST QUESTION PRESENTED

Whether the Circuit Court committed plain error in failing to reverse Bazan and Aleman's convictions for two conspiracies and remand the case with instructions to enter judgment of conviction for only one conspiracy and for resentencing of Bazan and Aleman accordingly, where: (1) such relief was granted to Flores; (2) Flores situation was identical to that of Bazan and Aleman; (3) "The facts in the instant cases meet the five Winship factors for the singularity of an offense ..."; and (4) the double jeopardy clause of the Fifth Amendment bars convictions for two conspiracies if only one conspiracy was proven.

SECOND QUESTION PRESENTED

Whether the Circuit Court erred in failing to vacate and remand the sentences on counts two and four after finding that Flores was illegally convicted and sentenced for two conspiracies rather than one conspiracy since the district court's entire four count sentencing scheme necessarily took into consideration the total offense characteristics of Flores' behavior, including that for the illegal conviction and sentence. (Pet.App. 27-30, 33-34.)

THIRD QUESTION PRESENTED

Whether the Circuit Court erred in failing to hold that the double jeopardy clause of the Fifth Amendment bars petitioners' multiple sentences for the Counts Two and Four convictions, which arose from the same identical facts of alleged possession at the same time and place, with intent to distribute, of more than both one kilogram of cocaine in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(A), and 18 U.S.C. 2 (Count Two), and 50 kilograms of marihuana in violation of 21 U.S.C. 841(a)(1) and 841 (b)(1)(B), and 18 U.S.C. 2 (Count Four).

FOURTH QUESTION PRESENTED

Whether the Circuit Court correctly held that Arturo Garza's search was private, not public, and thus not governmental action, since the record shows that Garza was employed by a rural water district and was required to go onto many of the ranches along El Negro Ranch Road and as such it appears that Garza was in fact a "peace officer" under Article 2.12(15), Vernon's Ann. Tex. Code of Crim. Procedure (1983). (Flores' rehearing ground no. 3.)

FIFTH QUESTION PRESENTED

Whether the Circuit Court erred in failing to hold that the district court reversibly erred in not suppressing the fruits of Flores' illegal detention and arrest and the resulting search of her purse and cloth make up bag.

SIXTH QUESTION PRESENTED

Whether the Circuit Court erred in holding "that where the government has offered no form of compensation to an informant, did not initiate the idea that he would conduct a search, and lacked specific knowledge that the informant intended a search, the informant does not act as a government agent when he enters another's property" since:

(1) it is clear that the government could not have legally stopped the tanker truck or identified Bazan and Flores but for the illegal trespass of informer Garza;

(2) the government (officer Matthews) had instructed informer Garza to watch for illegal narcotics activities on Bazan's (500 acre) ranch;

(3) the informer had a prior working relationship with the government (officers Saenz and Matthews), but in this case those officers failed to try to control informer Garza by giving him specific instructions not to violate any laws, namely "don't trespass on the curtilage of the Bazan ranch house".

SEVENTH QUESTION PRESENTED

Whether the Circuit Court erred in failing to reach (Pet. App. 20) the question about confidential informer Garza's search of the curtilage of the Bazan ranch where:

(1) the facts demonstrate petitioners had an expectation of privacy in the area viewed after Garza's trespass on the Bazan ranch; and

(2) by light from the Bazan ranch house, Garza observed the loading onto to the tanker/trailer between 2:30 a.m. and 5:30 a.m.

EIGHTH QUESTION PRESENTED

Whether the district court exceeded its authority in setting Bazan's Count 4 special parole term at 25 years because Congress could not have intended a conviction's special parole term to be disproportionate to the maximum punishment allowable for the underlying crime, where the applicable substantive statute prescribed imprisonment at not more than 15 years for possession, with intent to distribute, of more than 50 kilograms of marihuana. 21 U.S.C. 841(b)(1)(B).

NINTH QUESTION PRESENTED

Whether this Court could properly apply the concurrent sentence doctrine to refuse review of any of petitioners' four count convictions where:

1) the Parole Commission will use each of the four convictions to set the amount of time of incarceration before each petitioner's parole eligibility;
2) the district court imposed a special parole term on count 4 and $50 special assessment on each count;
3) the dual sentences on either counts 1 and 3 or counts 2 and 4 should merge into one sentence; and
4) the contraband in all counts was illegally seized and should be suppressed.

LIST OF ALL PARTIES BELOW

The parties at the circuit court are those at this Court.

STATEMENT OF RELATED CASES

This case has not previously been before this Court. However, certain of the issues here are already pending at but are unresolved by this Court. See Ray v. United States, ___ U.S. ___, 107 S.Ct. 454, 93 L.Ed.2d 400 (1986); and Salgado v. United States, No. 86-1386.

IDENTITY OF DEFENSE COUNSELS BELOW

Petitioners were represented at trial and at the circuit court by attorneys Heriberto Medrano (Bazan), Reynaldo S. Cantu, Jr. (Aleman), and J. Roberto Flores (Flores). Flores' co-counsel at the circuit court was Joseph A. Connors III.

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TO THE UNITED STATES SUPREME COURT:

Petitioners Jesus Bazan, Jr., Manuel Aleman and Graciela Flores respectfully pray that a writ of certiorari issue to review the December 29, 1986 judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The judgment of the district court is unreported. The opinion of the circuit court (Pet.App. 7-34.)[1] was reported. United States v. Bazan, 807 F.2d 1200 (5th

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[1] Citations to the Appendix to the petition for writ of certiorari will be to its pages as "Pet.App. ___". Record citations will be to "1R.__" (pp. 1-213) and "2R.__ (pp. 214-357) for the Clerk's Record and to the Reporter's Transcript as "1T.__" (pp. 1-74), "2T.__" (pp. 2-80), "3T.__" (pp. 2-118), "4T.__" (pp. 2-199), "5T.__" (pp. 200-399), "6T.__" (pp. 400-599), "7T.__" (pp. 600-799), "8T.__" (pp. 800-999), "9T.__" (pp. 1000-1199), "10T.__" (pp. 1200-1399), "11T.__" (pp. 1400-1599), "12T.__" (1600-1799) and "13T.__" (pp. 1800-1915).

Cir. 1986), rehearing denied, ___ F.2d ___ (1987).

JURISDICTION

This appeal stems from conviction of crimes against the United States. The district court for the Southern District of Texas, Brownsville Division had jurisdiction under 18 U.S.C. 3231. The circuit court had jurisdiction under 28 U.S.C. 1291. Its judgment and opinion were entered on December 29, 1986. (Pet.App. 6-34.) Only Flores filed a motion for rehearing. It was denied on February 12, 1987. (Pet.App. 4.) On February 23, 1987, this Court ordered that the time for filing this petition was extended to March 29, 1987. (Pet.App. 3.) This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS

The numerous applicable statutes, regulations and rules are printed in the appendix attached to the conclusion of this petition. (App.Attach.Pet. 64-81.) They are: Fourth and Fifth Amendments to U. S. Constitution; 18 U.S.C. 2, 3013, 3231, 4205, 4206 and 4207; 21 U.S.C. 812, 841, and 846; 28 U.S.C. 1254(1), 1291 and 2111; Fed.R.Cr.Proc. 35 and 52; Article 2.12(15), Vernon's Texas Code Crim. P. (1983) and Texas Water Code Section 51.132 (1983).

STATEMENT OF THE CASE

On July 2, 1985, five defendants, including these petitioners were charged in cause no. B-85-366 by indictment with four violations of the narcotics laws of the United States. (Pet.App. 44-47; 2R. 353-357.) Count One alleged that on or

about June 6, 1985 each defendant knowingly and intentionally did conspire together and with unknown persons to possess, with intent to distribute, over one kilogram of cocaine, in violation of 21 U.S.C. 846, 841(a)(1) and 841(b)(1)(A). Count Two alleged each defendant knowingly and intentionally possessed, with intent to distribute, over one kilogram of cocaine, namely approximately 846 pounds gross weight of cocaine on or about June 6, 1985, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(A) and 18 U.S.C. 2. Count Three alleged that on or about June 6, 1985 each defendant knowingly and intentionally did conspire together and with unknown persons to possess, with intent to distribute, over fifty kilograms of marijuana, in violation of 21 U.S.C. 846, 841(a)(1) and 841(b)(1)(B). Count Four alleged each defendant knowingly and

intentionally possessed, with intent to distribute, over fifty kilograms of marijuana, namely 125 pounds gross weight of marihuana, on or about June 6, 1985, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B) and 18 U.S.C. 2.

The evidentiary portion of the trial before a jury and District Judge Filemon B. Vela lasted from September 16 to 20, 23 and 24, 1985. (6T. 573 to 12T. 1780.) The jury found Flores, Aleman and Bazan guilty of all four counts. (Pet.App. 35-43; 1R. 95-97, 202-204.) On October 25, 1985, the trial court imposed sentence for each petitioner. (1R. 95-97.)

Bazan was sentenced to 20 years imprisonment on Counts One and Two, 10 years imprisonment on Count Three and 15 years imprisonment on Count Four. The Count Four sentence, which contains a special parole term of 25 years, is to run

concurrent to Counts One, Two and Three. Counts One, Two and Three run consecutively for a total of 50 years. As to each count, $50 special assessment was imposed for a total of $200, pursuant to 18 U.S.C. 3013. (Pet.App. 35-37; 1R. 97; 13T. 1904-1908.)

Aleman was sentenced to 15 years imprisonment on each count to run concurrently. On Count Four, a special parole term of 10 years was imposed. As to each count, a $50 special assessment was imposed for a total of $200, pursuant to 18 U.S.C. 3013. (Pet.App. 38-40; 1R. 96; 13T. 1908-1911.)

Flores was sentenced pursuant to 18 U.S.C. 4205(b)(2) to 7 years imprisonment on each count to run concurrently. On Count Four, a special parole term of 5 years was imposed. As to each count, a $50 special assessment was imposed for a

total of $200, pursuant to 18 U.S.C. 3013. (Pet.App. 41-43; 1R. 95; 13T. 1911-1915.)

Notices of appeal were timely filed. (1R. 100, 117 & 119.) Petitioners are presently incarcerated serving those sentences. The circuit court entered its judgment of affirmance on December 29, 1986. (Pet.App. 6.) Flores' motion for en banc rehearing was denied on February 12, 1987. (Pet.App. 4-5.)

Pursuant to the circuit court's opinion, the district court commenced Flores' resentencing hearing as to Counts 1 and 3 on March 26, 1987. After dismissing Count 1 of the indictment, the court granted Flores' motion for continuance. Sentence is scheduled to be imposed on Count 3 about 1:15 p.m. on March 30, 1987. At that time, the district court will consider modifying the sentences on Counts 2 and 4 as requested

in Flores' motion filed pursuant to Fed.R.Cr.P. Rule 35(b) on March 26, 1987.

STATEMENT OF THE FACTS

Viewing the evidence and all reasonable inferences which may be drawn therefrom in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), the jury trial evidence shows the following.

Arturo Garza, Jr. testified that he got involved in this situation because he is a concerned citizen of Starr County, and because as an ex-deputy of Starr County, he believed it was his duty to let the law know about the unusual traffic going through the El Sauz area as a result of some drug trafficking in which Jesus Bazan "possibly might have been involved." (6T. 573-577.) About 7:00 to 9:00 p.m. on June 5, 1985, Garza saw Jesus Bazan, Jr.

at the Fidel Perez' store. Bazan and a young lady got off the vehicle. Bazan made a phone call. They went in the store. Garza was still sitting outside in his truck. Early the next morning, Garza saw Bazan and a young lady up at the ranch. (6T. 586-589.) Garza saw one woman and some men working around the fifth wheel on the tractor-trailer, where it connects the tractor to the trailer. (6T. 599.) Garza saw these people bringing either boxes or bundles from the house, and taking them to the area of the truck's fifth wheel, and putting them in there. Garza could see three people but there could have been more. Garza could not see them all together. They were talking but Garza could not hear the words. Petitioner Flores was there helping them out. Garza identified her as one of people at the ranch. (7T.

600-607.) At the San Carlos Grocery Store, Garza called Mathews, telling him that the tractor-trailer had gone into the Bazan Ranch and he was out, going north. (7T. 613.) "I told him I was behind that truck. And I had a license number on it." (7T. 681.) "Bill, we have just got to stop it. I am going to stop it some way or another." (7T. 682-683.) Garza saw Graciela Flores carrying boxes or packages from the ranch house to the area of the tanker-trailer. The truck they were loading was between 30 to 50 yards away. (7T. 769-773.) Garza saw the female go in and out of the house, and she had packages in her hand. The female was wearing blue jeans and black shirt or T-shirt with white center. He saw her face. He saw her hair. Before the lineup, Garza gave officer Saenz a little description of the woman about a week or two after the

arrests. Garza told Saenz she was wearing blue jeans "and that shirt she was wearing." Her hair was in a ponytail. She was "Mexicana." And she had a broad nose. Slender. Not too big of a bust on her. She was the only female at ranch. There were only two pictures of females on lineup. Only one was Mexican-American. Garza picked out one of those pictures. Garza had never seen Flores before that night at the store. Besides the female, Jesus Bazan and the truck driver were going in and out of the house. As far as Flores is concerned, Garza saw her go in and out of house more than five times. Garza did not see any female wearing gloves. The person who told Garza that people had been arrested mentioned Flores' name. Until then, Garza did not know Flores' name. (8T. 852-858.)

Ralph McCormick, a U.S. Customs Service employee, testified a white pick-up showed up inside the ranch at the west gate about 7:10 a.m. McCormick was the first officer to arrive at ranch. (9T. 1010.) He went to the Bazan Ranch to preserve evidence. (9T. 1013.) No one went in the west gate until the warrant was served. (9T. 1024-1029).

Thomas Garcia, a U.S. Customs Investigator, testified he arrived at Bazan Ranch about 7:15 a.m. at Billy Mathews' request. Only McCormick was there, talking to Jesus Bazan. Graciela Flores was in a white pick-up there. (9T. 1036-1038). After Jesus Bazan locked the gate with a padlock, he drove in a northward direction. Garcia drove to and stopped at the east side of ranch. Garcia stayed there several hours. The fence was intact when Garcia went by it. A pick-up

went past Garcia. Later, Garcia found the fence had been cut. (9T. 1039-1044). Later, Deputy Saenz drove toward that cut area. Mathews called and basically said: "Get out there." (9T. 1047). In May, Mathews told Garcia that narcotics were leaving the Bazan Ranch. They set up an idea how to work: when Mathews got word it was happening, Garcia was to rush over to the gate to identify those leaving. (9T. 1049-1050.) About 11:00 a.m., Garcia went on the property and waited there by the house, waiting for a search warrant to search the area. Before the search warrant issued, DEA Agent Harper was taking a tire cast and Officer Funk was riding from the house down the road out of the ranch. (9T. 1055-1058.) Garcia did not know how long Jesus Bazan had been at the ranch. (9T. 1061.) Mathews went on

the ranch about an hour, an hour and a half before Garcia. (9T. 1067.)

Hilario Saenz, Jr., Chief Investigator for the Starr County Sheriff's Department, testified that it would not be normal for tanker trucks to be going and coming from Mr. Bazan's property. (9T. 1070-1074.) On the afternoon of the 6th, Garza called and told Saenz that he had gone into the ranch and he had seen some people inside. Saenz met McCormick on the "west--southwest gate of the property." (9T. 1076-1078.) Then within a few minutes, Saenz got a call by radio from Tom Garcia. Then Saenz proceeded up the road, heading east. Saenz encountered Bazan with his passenger Graciela Flores. Bazan was in process of driving a pickup and getting out of the property. He had cut a fence to get out. Saenz told Bazan: "that we had a search

warrant coming in and that it would be best if he go back inside the ranch." It was close to 8:00 o'clock. Bazan went back into ranch. (9T. 1079-1081.) Saenz went back to the west gate. C.P.O. Mathews arrived a few minutes later. There was talking on the radio with DEA agents or somebody and they decide to go inside the ranch. Mathews drove his government car through the same wire fence cut by Bazan. They went to the ranch's headquarters and there encountered Bazan and Graciela Flores. (9T. 1082-1083.) Saenz lifted over 50 different latent fingerprints from the boxes that contained the cocaine that were in the tanker-trailer that was seized in Hebbronville. Saenz only got six possibles. (9T. 1095-1097.) They went onto the Bazan ranch something like 8:30 a.m. When Saenz went on the property, he did not conduct a

search of the house. Saenz, Hiebert and Mathews went onto the ranch to arrest Mr. Bazan and to secure the area. (9T. 1106-1109.) Saenz went in the house. Saenz saw neither cocaine nor marihuana debris nor boxes anywhere on the floor of that house. (9T. 1111.) Prior to June 6th, Saenz or Mathews, or both, told Mr. Garza that it was important that he contact Mathews whenever he first saw traffic going onto the Bazan ranch so some law enforcement agency could commence surveillance to determine if there was any narcotic trafficking going on. (9T. 1117-1118.) Saenz, Mathews and Hiebert went into the ranch about 8:15 a.m. to place Bazan under custody there by his ranch house. Then Saenz gathered some evidence. About 10:00 a.m., Saenz and other agents were checking parts of the ranch. About 1:30 p.m., Saenz and the other officers

were notified that the search warrant had been issued in McAllen. Three and one-half hours before that search warrant issued, Saenz had started conducting the investigation and assisting in the gathering of evidence. (9T. 1128-1130.) Arturo Garza lives right at the intersection of FM 649 and El Negro Ranch Road. He can not see the Bazan Ranch from his house or from the top of a Ram Charger with binoculars. There is not a water line from El Sauz Water Supply toward the Bazan Ranch. (9T. 1165-1167.) They never told Mr. Garza to go into the ranch. Garza has no keys to the Bazan Ranch. (9T. 1170-1171.) Saenz' fingerprint report was inconclusive as to the 50 latents found on the 21 boxes. Graciela Flores was arrested a few minutes after Mr. Bazan was arrested. The cocaine was in boxes. It was wrapped, etc. As the

agents searched the ranch house, they found no such boxes, tape, plastic wrappings, debris, nor marihuana. (9T. 1188-1192.) The female photo lineup had two females in it. One is non-hispanic. The other is Graciela Flores. About a month after arrest in the presence of five officers, this book of photos was shown to Garza after Saenz told Garza that four male subjects and one Mexican-American female were in custody. The district court admitted into evidence the photos marked GF-2 (Graciela Flores' photo) and GF-1 (the other female photo). No evidence of Graciela Flores' fingerprints were found on those boxes. (9T. 1194-1198.) On June 6, Saenz got a brief description from Garza that he had seen Bazan and Graciela Flores at the store in El Saenz the previous afternoon. (10T. 1241-1244.)

Billy Mathews, a U.S. Customs Service Group Supervisor, testified he had known Garza about 10 years. On May 4, 1985, he talked to Garza at his barn about some possible drug activities involving Bazan and his ranch near El Sauz. On May 11, Garza called and wanted to meet with Saenz and Mathews. At that meeting, Garza advised that he thought "Mr. Bazan was using the ranch out there to -- as a narcotics distribution terminal." (10T. 1247-1251.) On June 5, they talked on phone and Garza told Mathews trucks were going and coming. As Mathews had instructed him to call upon truck movement, Garza called Mathews collect on June 6 at 5:25 a.m. He said a truck went in the Bazan ranch at 2:30 a.m. and left at 5:10 a.m. and it was loaded and it was speeding toward Hebbronville. He said that he would follow the truck. He hung

up. (10T. 1252-1255.) Mathews called Houston Communications and gave a description of the truck. Mathews called Hammond to try to get him to intercept the vehicle. Then Mathews called DEA's Vic Mason. Then Mathews called Saenz. Garza told Mathews he went on the ranch, because "he just wanted to be sure that he was positive about what he had been telling me. And he was familiar with the area. And that he wanted to be positive that the information that he gave us was true." At 6:20 a.m., Mathews got a call, saying Border Patrol had stopped a truck-trailer and had discovered on it marihuana debris and strong odor and then had removed the vent cap and could see boxes and more debris in the trailer. Then Mathews called Mason and told him a truck had been loaded and that Mathews would initiate the pre-arranged plan. (10T. 1255-1261.) The

plan was being put into operation at that time. At 6:50 a.m., Mr. Hammond called from Hebbronville and advised Manuel Aleman drove the tank-trailer, which was loaded with boxes of marihuana. Mathews got a radio call from McCormick that he had identified Bazan on the Ranch and Bazan had asked "Why he was there?" Mathews arrived at the ranch at 8:00 o'clock. Mathews heard another radio message that Mr. Mason had said take Bazan into custody. Before Mathews went on the ranch, Mathews noticed a fence had been cut. (10T. 1261-1267.) Hiebert, Saenz and Mathews drove through the cut fence onto the ranch and followed the tracks up to the Bazan ranch. As they arrived, Bazan was coming from the house, walking toward their car. Graciela Flores was at the door. Mathews identified her in court. (10T. 1268-1271.) Mathews placed

Bazan under arrest shortly after the officers arrived. The officers arrested Flores probably about 30 minutes later. After going through the house, Mathews went back to car. They were outside. Ms. Flores wanted some cigarettes. She and Mathews went back into the home to obtain cigarettes from her purse. Mathews opened up her purse to get them and there was a loaded pistol in it. (10T. 1273-1279.) Mathews removed her package of cigarettes and book of matches from the purse and handed them to her. Mathews told her that he was going to take possession of the gun and her purse and he would take them out to the car. Mathews took the cloth bag too. It was full of make-up stuff. After feeling something long and hard in the cloth bag, Mathews also removed a loaded weapon from that bag. Mathews turned the bag, purse and weapons over to Agent

Herber at about 1:40 p.m. that day. Mathews stayed there until 2:00 p.m. (10T. 1279-1283.) About 11:00 p.m. on June 8, 1985, Mathews talked to Garza at Mathew's house. Garza told Mathews he could identify Graciela Flores as being at the ranch house when the truck was loaded. On July 17 at 7:00 p.m., Mathews showed Garza the photo lineup. (10T. 1293-1296.) On the phone at 5:20 a.m. on June 6th, Garza did not say he had seen Jesus Bazan, Jr., Graciela Flores, Manuel Aleman, Roman Bazan, Ralph Alaniz, or Margarito Alvarez out there at the ranch "loading this truck" that he was following. Mathews did not personally talk to Mr. Garza for the next 50 hours. (10T. 1300-1303.) On June 8, Garza explained what he had seen as to loading the truck. Mathews took notes. The photo spread was compiled by Hammond at Mathew's office. Mathews reached in

the vault and pulled it out. (10T. 1305-1311.) On June 6, 1985, Mathews got Garza's call at 5:22 a.m. Mathews did not call anyone until 6:30 a.m. because Mathews wanted to make sure the truck did have narcotics on it. (10T. 1321-1322.) A little after 8:00 a.m., the officers went to the Bazan ranch home and secured the place. Mathews entered the ranch to arrest Jesus Bazan through the cut in the fence. Mathews immediately went to the house and placed Bazan under arrest. Then Mathews just stayed there. The officers waited a long time there. Everybody was restless. "We just sat there and waited until we heard that a warrant had been signed by the U.S. Magistrate." (10T. 1326-1331.) Bazan stayed behind the car on a chair a good while. Then it got hot. About 11:00 a.m., the officers moved Bazan by the side of the house where it was

shady. Mathews escorted the lady out to the outhouse one time. After the warrant got there, the other agents were looking for marihuana and cocaine in the house and outside around the house. Nobody found anything. (10T. 1334-1336.) In May, Garza told Mathews that he suspicioned the ranch being "used as a narcotics distribution terminal." (10T. 1343.) On May 13, Garza told Mathews he thought "the illegal activity, the loading of the truck, itself, or trucks, was going on over here at the barn." The barn is quite a distance from the house on the Bazan ranch. (10T. 1362-1363.) At 5:20 a.m. on June 6, Garza said that he saw the truck come out of the ranch and it was loaded. Mathews did not send anybody out to the ranch because it was not confirmed. (10T. 1369-1370.) During the three hour June 8 debriefing, Garza told Mathews "that he

had seen some people out there loading a tanker-trailer. And I believe he had also seen one or two Suburbans on the ranch bringing boxes from the field there to the house. And they were unloading the boxes and putting them inside the tanker-trailer." (10T. 1376, line 25 to 1377, line 8.) Garza "identified Jesus Bazan, Jr., Graciela Flores, Ralph Alaniz, Roman Bazan, the truck driver, Manuel Mendez Aleman, as being present when the cocaine was loaded into the truck and also Photograph No. 50, Margarito Juan Alvarez." (10T. 1387, lines 5-9.) Garza is not a confidential informant that Mathews paid. "He is an ordinary citizen." (10T. 1389.) Mathews never told Garza to go on the ranch. Mathews only told him to let him know when a truck went into the ranch -- turning onto El Negro Ranch Road there at El Sauz. They

would have to go into the ranch before the officers would have the probable cause. (10T. 1390-1391.) On June 6th, Mathews received that call and Garza said: "that a White truck-tractor and trailer had entered the ranch at about -- entered the Bazan Ranch at about 2:30 hours and had departed at approximately 5:10 loaded. And it was traveling north on Texas Farm and Market 649 at a high rate of speed towards Hebbronville, Texas. 'And I am going to follow him.'" (10T. 1394, line 19 to 1395, line 2.) Mathews put Jesus Bazan under arrest after Mathews was ordered to do so by DEA. Mathews was told by DEA over the radio "to take him into custody and to protect any further evidence, if there was any other evidence, on the ranch. And to secure the ranch. That's what I did." (10T. 1398-1399.) Mathews testified: "We were told to detain

all the people that were on the ranch." They did. It was only later necessary for officer Hiebert to arrest Graciela Flores, when she got off her chair, walked around behind the car and was reaching in the window, while Mathews was talking on the car radio. (11T. 1406-1407.) She was not at that time arrested for any narcotics or for the weapon found in her purse. That was no violation of the law at that time for a person to have a weapon in a desolate area like that. (11T. 1408.)

Jane Ann Herber, a DEA special agent, testified officer Mathews gave Herber a purse, a makeup kit and two pistols that he said he had taken from Miss Flores. Government Exhibit No. (hereinafter cited GE#) 32 and 33 were those two pistols with loaded clips. They were admitted over Flores' objection "as previously stated." In checking that purse, Herber found a

clear plastic baggie containing a small quantity of marihuana. In the makeup kit, Herber found a white powder in two pieces of plastic cellaphane. GE# 34 and 35 are that marihuana and powder. (11T. 1420-1425.) GE# 38-A and 38-B are photos of packages of cocaine. (11T. 1466-1467.)

Alan Tittle, a DEA special agent, testified that the majority, 20 of them in fact, of the boxes removed from the tanker-trailer contained cocaine. Those 20 cardboard boxes contained approximately 315 packages. There was marihuana in another box, burlap sack and some loose substance. (11T. 1488-1494.)

Leo Pulte, a DEA chemist (11T. 1511), testified he received 11 boxes. They weighed 812.5 pounds. He opened them and inside were 315 brick like boxes. Each brick weighed one thousand grams. The

total was 315,000 grams or 693 pounds. The 315 cocaine samples had a composite purity of 91 percent. They contained no cutting agent. They were probably all about the same purity. (11T. 1515-1519.) He also analyzed GE# 34. The powder in that bag was lidocaine. It is not a controlled substance; but it is one of the normal cutting agents for cocaine. (11T. 1523-1528.) GE# 34 and 35 were admitted into evidence. (11T. 1531.)

Victor C. Mason, a DEA special agent, testified approximately 125 pounds of marijuana were seized from the tanker-truck. Part of that marijuana was admitted over defense objection. (11T. 1559-1563.) Part of the seized cocaine was admitted over defense objection. (11T. 1564-1565.) Graciela Flores' car was the dirty 1978 Cadillac parked at the motel in Rio Grande City. (12T. 1673.)

REASONS FOR REVIEWING FIRST QUESTION

In this case, the Fifth Circuit Court affirmed without noticing the "plain error" first pointed out in this petition. On its own motion, this Court may notice those plain errors. Screws v. United States, 325 U.S. 91, 107, 65 S.Ct. 1031, 1038, 89 L.Ed. 1495 (1945).

Bazan and Aleman submit that the circuit court reversibly erred in failing to sua sponte notice this first question presented in this petition. Bazan and Aleman respectfully suggest that the appropriate remedy is for this Court to (a) grant this petition for writ of certiorari and (b) decide the merits of this case.

In its opinion, the circuit court reversed Flores' conviction for two conspiracies and remanded the case with instructions to enter judgment of

conviction for only one conspiracy and for resentencing of Flores accordingly. (Pet.App. 33.) The circuit court failed to grant, but should have granted, the same relief to petitioners Bazan and Aleman. Their situations were identical to Flores. Each could have received the same relief. The circuit court's opinion is instructive. The applicable part is found at 807 F.2d 1205-1206. (Pet.App. 27-30.)

With the facts and law here being so clear, like Flores petitioners Bazan and Aleman should also have received reversals of the two separate conspiracy counts. Since the circuit court noted "[t]he facts in the instant cases meet the five Winship factors" but saw the reversible error as to Flores and missed the plain error as to Bazan and Aleman, this Court may notice

that plain error. Fed. R. Cr.P. 52(b). Then this Court can grant this petition for certiorari and order that Bazan and Aleman's convictions for two conspiracies be reversed, and the case remanded with instructions to enter judgments of conviction for only one conspiracy and for resentencing of Bazan and Aleman on these three remaining convictions.

REASONS FOR REVIEWING SECOND QUESTION

In this case, the circuit court's decision conflicts with United States v. Hines, 256 F.2d 561, 564 (2nd Cir. 1958): Busic v. United States, 639 F.2d 940, 947-953 (3rd Cir. 1981), cert. denied, 452 U.S. 918, 101 S.Ct. 3055, 69 L.Ed.2d 422 (1981); and United States v. Rosen, 764 F.2d 763, 767 (11th Cir. 1985), cert. denied sub nomine Holmes v. United States,

___ U.S. ___, 106 S.Ct. 806, 88 L.Ed2d 781 (1986)

The circuit court correctly determined that Flores' conviction and sentence on two separate conspiracy counts based on a single agreement violated the double jeopardy clause of the Fifth Amendment. (Pet.App. 27-29.) That circuit court, however, erroneously went on to provide the following remedy (Pet.App. 33-34):

> "Flores' conviction for two conspiracies is reversed, and the case is remanded with instructions to enter judgment of conviction for only one conspiracy and for resentencing of Flores accordingly. In all other respects the judgment of the district court is affirmed."

Flores submits that the interests of justice dictate that upon elimination of one of the conspiracy convictions, this cause be remanded to the district court for resentencing on all the affirmed

counts. United States v. Hines, 256 F.2d 561, 564 (2nd Cir. 1958) [under the circumstances, the court thought the sentences on the good counts should be vacated with remand for full resentencing]; Busic v. United States, 639 F.2d 940, 947-953 (3rd Cir. 1981), cert. denied, 452 U.S. 918, 101 S.Ct. 3055, 69 L.Ed.2d 422 (1981) [appellate court can remand all sentences, whether challenged or not]; United States v. Rosen, 764 F.2d 763, 767 (11th Cir. 1985), cert. denied sub nomine Holmes v. United States, ___ U.S. ___, 106 S.Ct. 806, 88 L.Ed.2d 781 (1986). There the Court said:

> "Sentencing on a multi-count conviction is an interrelated and intertwined process because of the statutory provisions for concurrent and consecutive sentences. See generally, Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C.A. § 801 et seq. Where an entire conviction is challenged on direct appeal, double jeopardy and due process are not implicated when

> all sentences, both proper and improper, are remanded, because of the holistic nature of the trial judge's sentencing decision. Multiple count convictions present the trial judge with the need for a sentencing scheme which takes into consideration the total offense characteristics of a defendant's behavior. When that scheme is disrupted because it has incorporated an illegal sentence, it is appropriate that the entire case be remanded for sentencing."

Cf. United States v. Manbeck, 744 F.2d 360, 391 (4th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 1197, ___ L.Ed.2d ___ (1985) [no remand for resentencing].

Since the district court abused its discretion in entering its guilty judgment and sentence on one of the conspiracy counts, this Court must consider whether there is a reasonable possibility that error was of such harm as to cause the rendition of an improper judgment when the sentences were simultaneously entered on Counts 1 through 4. The question is

whether there is a reasonable possibility that the trial court's erroneous belief about the existence of two conspiracies contributed to the punishment assessed as the sentences on the other counts. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Obviously, once the district court learns from the appellate court that petitioners were not guilty of two conspiracies, there is a reasonable probability that the sentencing judge will desire to give petitioners lower sentences on substantive counts two and four, since this case now involves not four but only three counts. All of those stemmed from the same criminal transaction. See Pennsylvania v. Goldhammer, 474 U.S. ___, 106 S.Ct. 353, 88 L.Ed.2d 183 (1985); United States v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980); United States v.

Rosen, supra, 764 F.2d at 767 [Holmes challenged his entire sentence on direct appeal; the court noted his sentences were interdependent, stemming from the same criminal transaction]; Singletary v. United States, 514 F.2d 617 (4th Cir. 1975)[where defendant is given general sentence upon conviction on six counts and two counts are subsequently reversed, case should be remanded for determination of whether two counts influenced general sentence]; United States v. Colunga, 786 F.2d 655, 658-659 (5th Cir. 1986). See also McClain v. United States, 676 F.2d 915 (2nd Cir. 1982); United States v. Raimondo, 721 F.2d 476 (4th Cir. 1983).

This Court has the opportunity to declare that this recent line of cases, Goldhammer, DiFrancesco, Busic, Rosen, McClain, Raimondo and Colunga, stand for the innovative proposition that a federal

defendant's multiple sentences imposed at one sentencing hearing are a collective whole and must be viewed as a package. That principle, which can usually be applied to the prejudice of defendants, should now be applied where it may benefit petitioners. This Court should declare that an appellate court ordinarily should remand the entire case for resentencing after finding error that requires reversal of one or more of multiple convictions, at least where the reversed convictions reasonably affected the sentencing determination on the affirmed convictions.

REASONS FOR REVIEWING THIRD QUESTION

Without prior specific guidance from this Court, the circuit court erred in resolving this double jeopardy issue of whether simultaneous possession of two different controlled substances could

constitutionally result in more than one conviction. (Pet. App. 30-31.)

The very reasoning in the circuit court's opinion (Pet.App. 30-31) in overruling this very contention by Flores was rejected and not followed by Unit B of the former Fifth Circuit, when that court held that convictions with two sentences could be had for simultaneous possession of two different types of controlled substances. United States v. Davis, 656 F.2d 153, 159-160 (5th Cir. 1981), cert. denied, 456 U.S. 930, 102 S.Ct. 1979, 72 L.Ed.2d 446 (1982).

In Braden v. United States, 270 F. 441 (8th Cir. 1920), the court held that the Harrison Narcotic Act, making it unlawful for an unregistered person to have in his possession "any of the aforesaid drugs," did not authorize a conviction on separate counts for each

kind of drug found in Braden's possession at the same time.

In United States v. Martin, 302 F.Supp. 498 (W.D. Pa. 1969), aff'd on other grounds, 428 F.2d 1140 (3rd Cir. 1970), cert. denied, 400 U.S. 960, 91 S.Ct. 361, 27 L.Ed.2d 269 (1970), the court held that where the defendant was in possession of both heroin and cocaine at the same time and at the same place, each drug could not be the basis for a separate count.

Each petitioner submits that the Double Jeopardy Clause was violated by sentencing each petitioner under both Counts Two and Four for possession with intent to distribute not only over one kilogram of cocaine but also over fifty kilograms of marijuana when "only one substantive" controlled substance offense occurred.

The single statutory penal theory, under which each petitioner was twice punished on this indictment's Counts Two and Four, are 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. The former provides:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> > (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; ....

That statutory language, however, does not indicate whether a person who possesses both marihuana and cocaine with the same culpable mental state at the same time and at the same place commits two crimes or one crime. The legislative history is equally uninstructive on the appropriate unit of prosecution in this case.

Applying the Blockburger double jeopardy test to Counts Two and Four, each petitioner's punishments are for the "same offense." The possessions charged were not distinct, separate possessions occurring at different times. The evidence shows one simultaneous possession of two different controlled substances. "The distinction stated by Mr. Wharton is that, 'when the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.' Wharton's Criminal Law (11th Ed.) § 34." Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 181, 76 L.Ed. 306 (1932).

In each petitioner's case at bar, the first transaction alleged in Count 2 had

not come to an end when that alleged in Count 4 occurred. The possession alleged in Count 4 was part of the alleged original impulse described in Count 2. That is to say, the impulse behind both alleged transactions is but a single one. As applicable to the facts of this case, 21 U.S.C. 841(a)(1) creates but the single offense of knowingly or intentionally possessing, with intent to distribute, a controlled substance. Thus, upon the face of the statute, only one distinct offense was committed.

In summary, petitioners request this Court to determine that in the legislation under which the indictment was brought, the Congress did not intend to permit a convict to be punished twice for the single course of possession prosecuted by this indictment's Counts Two and Four. In effect, the single transaction of

possession of both cocaine and marijuana formed the basis of both convictions and sentences. This Court should reach the constitutional double jeopardy issue or declare the Congressional unit of prosecution for this single course of conduct. Once this Court resolves this issue in petitioners' favor, then this Court should remand the case for resentencing by the district court. Then the prosecution should elect between the challenged substantive counts upon which the single verdict of guilty would then be returned. The district court would then set aside the conviction on the count not elected by the prosecution and would impose a sentence only upon the remaining one. See United States v. Colunga, 786 F.2d 655, 658-659 (5th Cir. 1986.)

REASONS FOR REVIEWING FOURTH QUESTION

The record shows that Garza was employed by a rural water district and was required to go onto many of the ranches along El Negro Ranch Road. (5R-583.) Article 2.12(15), Vernon's Ann. Tex. Code of Crim. Procedure (1983) provides, inter alia, that:

> The following are peace officers:
>
> *****
>
> (15) officers commissioned by a water control and improvement district under Section 51.132, Water Code.

Thus, the only question which cannot be answered from the present record is whether Garza was in fact a commissioned "peace officer" under Section 51.132, Texas Water Code. If Garza was in fact a "peace officer" as defined above, then all parties to this lawsuit have been misled and in the interest of justice, this cause

should be remanded to ascertain whether or not Garza was in fact a peace officer.

A remand is necessary in this case because the challenged search and seizure cannot be sustained based on the "open fields" doctrine. In Oliver v. United States, 466 U.S. 170, 104 S.Ct. 1735, 1741, 80 L.Ed.2d 214 (1984), the Court concluded that "an individual may not legitimately demand privacy for activities conducted outdoors, in fields, except in the area immediately surrounding the home." The "private" activities for which legitimate demand is made in this case, was in the outdoors area immediately surrounding the home. Thus, the "open fields" doctrine does not apply. See United States v. Dunn, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (1987).

REASONS FOR REVIEWING FIFTH QUESTION

The circuit court's entire treatment of petitioner Flores' personal Fourth Amendment issue (her intermediate ground of error no. 7) is found at 807 F.2d 1206-1207. (Pet.App. 31-33.)

In Ybarra v. Illinois, 444 U.S. 85, 92, 100 S.Ct. 338, 342, 62 L.Ed.2d 238 (1979), this Court said, "Where the standard is probable cause, a search or seizure must be supported by probable cause particularized with respect to that person." The "particularity" requirement, of course, is not just an empty formality. Flores submits that one good purpose it serves is to prevent wholesale arrests of entire families based on probable cause to arrest one member thereof. In this case, however, the circuit court has in effect authorized wholesale arrests of "any person found on the Bazan ranch" allegedly

because unlike in Ybarra, here the ranch was private not public, and that Flores was in the truck with her "husband" Bazan when he cut the ranch's fence in effort to escape.

Petitioners submit that in the context of this case the private vs. public exception found by the circuit court is an exception without a difference. Indeed the exception would be more appropriately applicable to a like situation in a public place, as opposed to private property near the residence, because of the violence that would be exacted against the entire family unit for the acts or omissions of one or more of its members. As written, the circuit court's opinion stands for the proposition that the officers could have arrested anyone regardless of age or family relationship because of what the officers

knew about Jesus Bazan and because of what Jesus Bazan did or did not do. As such, the circuit court's opinion is palpably wrong and should not be allowed to stand.

Flores agrees with the district court's conclusion that she was under arrest when confronted by Officer Saenz at 7:47 a.m. (Pet.App. 60-63; 1R. 161.) Although there is testimony that at first Flores was not arrested for having weapons in her purse and makeup bag (4T. 43-47), at trial Officer Mathews testified that they were told to detain all the people that were on the ranch. (11T. 1407, line 21.) Thus, this Court should now focus on the validity of Flores' arrest. In a nutshell, the circuit and district courts determined that the Government had probable cause to arrest Flores based on what the Government had learned about Jesus Bazan, and the fact that Flores was

in Bazan's company that morning. (1R. 161-162.)

It is essential to remember that at 7:47 a.m., when Flores was first seized [arrested], the evidence of the officers' collective knowledge was that Flores was a passenger in the pickup truck Bazan was driving when he cut his fence in an effort to escape, and that confidential informant Garza had called customs officer Mathews, advising him "that a white truck-tractor pulling a tank-trailer had entered the Bazan Ranch at 2:30 in the morning, approximately 2:30 and it departed about 5:10 and it was traveling north on Farm Road 649 at a high rate of speed toward Hebbronville, Texas. And he said 'I am going to follow it.' And he hung up the phone." Mr. Mathews stated that was all that was said. (4T. 31, lines 10-16.) Thus as to Flores, the only facts known by

the officers' collective knowledge was only that she had been a passenger in the truck with her "husband" Bazan at one point. Nothing else! How can that be enough for this Court--the bulwark of individual liberty? The "kilo rule" should have no effect where the Fourth Amendment has been violated.

It is well established that "Mere similarity of conduct among various persons and the fact that they associated with or are related to each other do not establish the existence of a conspiracy." United States v. White, 569 F.2d 263, 268 (5th Cir. 1978).

Flores submits that her warrantless arrest at 7:47 a.m. or later was illegal. Her "arrest" with a warrant about 1:30 p.m. was also illegal. The fruits of her unlawful arrest(s) were the seizure of the following: .25 cal. pistol, .380 cal.

pistol (4T. 44), a small amount of marijuana, and some lidocaine. (5T. 343-344.) The initial focus is on the seizure of the purse by Mathews which contained the .25 cal. pistol. (4T. 44.) Graciela Flores while still being detained asked for some cigarettes from her purse and Mathews went with her to go get tne cigarettes inside the house. However, prior to Flores getting her purse, Mathews asked her if she had a weapon. She answered in the affirmative. (4T. 43-44.)

It is clear that tangible evidence and statements obtained or made during a period of illegal detention, are inadmissible, even though voluntarily given, if such evidence is a product of illegal detention and not the result of an independent act of free will. Dunaway v. New York, 442 U.S. 200, 218-219, 99 S.Ct. 2248, 2259-2260, 60 L.Ed.2d 824 (1979);

Brown v. Illinois, 422 U.S. 590, 601-604, 95 S.Ct. 2254, 2260-2261, 45 L.Ed.2d 416 (1975). This Court should find unreasonable the warrantless entry, detention, arrest, seizure and search. See United States v. Munoz-Guerra, 788 F.2d 295, 296 (5th Cir. 1986).

Even assuming the general validity of the search warrant, when it is applied to Flores, she would appear to be in the same position as the defendant in Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979). In Ybarra, the Court concluded that the search was invalid because the police had no reason to believe Ybarra had any special connection with the premises, and the police had no other basis for suspecting that Ybarra was armed or in possession of contraband.

In conclusion, Flores submits that since the initial arrest was invalid under

the Fourth Amendment, the evidence later seized was clearly fruits of that illegality. This error was harmful to Flores because other than the uncorroborated testimony of Arturo Garza, Jr., two pistols, marijuana, and lidocaine were the only possible evidence from which a jury could speculate that Graciela Flores was guilty of the offenses charged. Thus this error was reversible. This Court should reverse and remand for new trial with the instructions that the challenged evidence be suppressed.

REASONS FOR REVIEWING SIXTH QUESTION

The circuit court erred in holding (Pet.App. 19-20) that informer Garza acted as a private citizen not a government agent, when he trespassed upon Bazan's ranch and got within 30 to 50 yards of the house. (7T. 769-773.) The government's

officers failed to properly instruct informer Garza to refrain from violating any laws while he was working for them. Thus, the government in court can not hide behind the "private citizen" doctrine. It was improper for the district and circuit courts to permit the government to disclaim responsibility for the acts of its informer by deliberately turning its back on conduct the officers could reasonably have anticipated their informer would use to "get the goods" on what allegedly was occurring inside the seclusion of the 500 acre Bazan ranch. Such governmental responsibility for its informer's conduct is especially applicable here where the officers failed to properly instruct the informer as to what he could not do as the government's informer. See United States v. Bennett,

729 F.2d 923 (2nd Cir. 1984) and United States v. Bennett, 709 F.2d 803 (2nd Cir. 1983).

REASONS FOR REVIEWING SEVENTH QUESTION

The circuit court reversibly failed to reach this "curtilage-open fields" issue. (Pet.App. 20.) Petitioners recognize United States v. Dunn, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (1987). Here the law enforcement officers' informer Garza got within 30 to 40 yards from the Bazan ranch house. (6T. 586-589, 595-596, 599; 7T. 769-773; 8T. 852-858.) Garza's observations from there, the house's curtilage, violated the Fourth Amendment. The district and circuit courts erred in not ordering the suppression of all seized contraband.

REASONS FOR REVIEWING EIGHTH QUESTION

Congress has determined that the proper range of punishment for an unenhanced offender is 15 years for possession, with intent to distribute, of more than 50 kilograms of marihuana. Thus, the 25 years special parole term imposed on Bazan on Count 4 conflicts with Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). Solem held that the Constitution requires a sentence to be proportionate to the crime for which a defendant has been convicted.

Most courts have agreed that a lifetime special parole can be imposed

under 21 U.S.C. 841(b)(1)(B).[2] However, no court has considered this question in light of the Solem reasoning. Through 21 U.S.C. 841(b)(1)(B), Congress has granted the trial courts discretion in assessing special parole terms. However, only such

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[2] See United States v. Waldon, 578 F.2d 966, 972 (3rd Cir. 1978); United States v. Rich, 518 F.2d 980, 986 (8th Cir. 1975), cert. denied, 427 U.S. 907, 96 S.Ct. 3193, 49 L.Ed.2d 1200 (1976); United States v. Dayton, 592 F.2d 253, 254 (5th Cir. 1979), rehearing denied en banc, 604 F.2d 931, cert. denied, 445 U.S. 904, 100 S.Ct. 1080, 63 L.Ed.2d 320 (1980), supplemented cert. denied, sub nomine Flanagan v. United States, 445 U.S. 971, 100 S.Ct. 1665, 64 L.Ed.2d 249 (1980); Walberg v. United States, 763 F.2d 143, 148-149 (2nd Cir. 1985); United States v. Bridges, 760 F.2d 151, 153 (7th Cir. 1985), and cases cited therein. Cf. United States v. Tebha, 578 F.Supp. 1398 (N.D. Cal. 1984), reversed, 770 F.2d 1454 (9th Cir. 1985).

term whose length is proportionate to the offense, may constitutionally be imposed. It follows that the district court could not constitutionally impose on Bazan any special parole term whose length is above the maximum of 15 years provided by law for the alleged primary offense. In light of the allegata, probata and the district court's jury instructions authorizing conviction, Bazan submits that the district court illegally imposed the special parole term of 25 years on Count 4. The district court exceeded the 15 years term Congress determined as the maximum range of punishment for the very crime for which Bazan was convicted.

REASONS FOR REVIEWING NINTH QUESTION

Each petitioner believes that this Court should not apply the concurrent sentence doctrine in this case. There is a significant likelihood that with any of

these convictions going unreviewed, each petitioner will suffer adverse collateral consequences (lengthened incarceration = reduced parole opportunity). Without a reversal of both convictions under Counts 1 and 2, the Parole Commission has noticed Flores to plan on 100^{+} months incarceration (while serving her sentence of 84 months). (Pet.App. 118-119.)

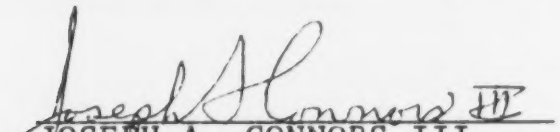
Each petitioner suggests it would be improper for this Court to invoke that doctrine because (1) numerous errors need fixing; (2) judicial correction of those errors will greatly affect the time at which each petitioner becomes eligible for parole; and (3) there are numerous reasons for abolition of that doctrine. See United States v. Escobar DeBright, 730 F.2d 1255 (9th Cir. 1984). Compare Ray v. United States, ___ U.S. ___, 107 S.Ct. 454, 93 L.Ed.2d 400 (1986).

CONCLUSION

For those reasons, petitioners respectfully suggest that the questions presented are ripe for resolution by this Court. Those issues are of crucial importance. This Nation is trying to not lose its War on Drugs. That War is ultimately being waged, in courtrooms throughout this country, when prosecutors attempt to properly obtain convictions and long sentences for serious traffickers. The Bench and Bar need this Court's immediate instructions on "how to do it right the first time." Bazan et al, provides that teaching tool.

DATED: March 28, 1987.

Respectfully submitted by
Petitioners' Attorneys,



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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

NO. _____

JESUS BAZAN, JR., MANUEL ALEMAN
and GRACIELA FLORES,

Petitioners

VS.

UNITED STATES OF AMERICA,

Respondent

APPENDIX ATTACHED TO PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

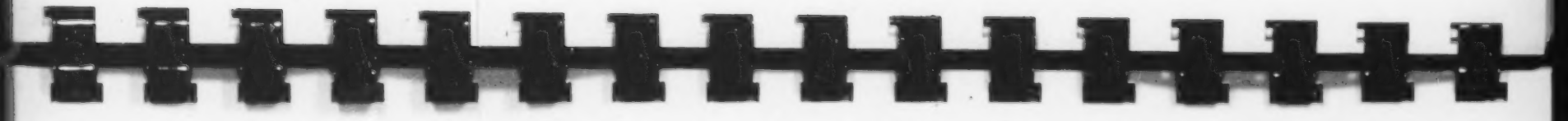
RELEVANT CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS

The Constitution's Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Constitution's Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."



28 U.S.C. 1254(1) provides in part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> > (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; ....
> > (June 25, 1948, C. 646, 62 Stat. 928.)

28 U.S.C. 1291 provides:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.
> (As amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.)

18 U.S.C. 3231 provides in part:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

(June 25, 1948, C. 645, 62 Stat. 826.)

18 U.S.C. 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.
>
> (June 25, 1948, ch. 645, § 1, 62 Stat. 684; as amended Oct. 31, 1951, ch. 655, § 17b, 65 Stat. 717.)

18 U.S.C. 3013 provides in part:

> (a) The court shall assess on any person convicted of an offense against the United States—.
>
> *****
>
> (2) in the case of a felony—
>
> (A) the amount of $50 if the defendant is an individual; and
>
> (B) the amount of $200 if the defendant is a person other than an individual.
>
> (b) Such amount so assessed shall be collected in the manner that fines are collected in criminal cases.

(Added Pub.L. 98-473, Title II, § 1405(a), Oct. 12, 1984, 98 Stat. 2174).

18 U.S.C. 4205 provides in part:

(a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

(b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.
(Pub. L. 94-233, § 2, Mar. 15, 1976, 90 Stat. 222.)

18 U.S.C. 4206 provides:

(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he

has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

(2) that release would not jeopardize the public welfare;

subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

(b) The Commission shall furnish the eligible prisoner with a written notice of its determination not later than twenty-one days, excluding holidays, after the date of the parole determination proceeding. If parole is denied such notice shall state with particularity the reasons for such denial.

(c) The Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing: Provided, That the prisoner is furnished written notice stating with particularity the reasons for its determination, including a summary of the information relied upon.

(d) Any prisoner, serving a sentence of five years or longer, who is not earlier released under this section or any other applicable provision of law, shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term or terms of more than forty-five years including any life term, whichever is earlier: Provided, however, That the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime.
(Pub.L. 94-233, § 2, Mar. 15, 1976, 90 Stat. 223.)

18 U.S.C. 4207 provides:

> In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:
>
> (1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;
>
> (2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;
>
> (3) presentence investigation reports;
>
> (4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge;
>
> (5)[1] a statement, which may be presented orally or otherwise, by any victim of the offense for which the prisoner is imprisoned about the financial, social, psychological, and emotional harm done to, or loss suffered by such victim; and
>
> (5)[1] reports of physical, mental, or psychiatric examination of the offender.

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[1] So in original. Two paragraphs (5) have been enacted.

There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available.

(Pub.L. 944-233, § 2, Mar. 15, 1976, 90 Stat. 224.)

21 U.S.C. 812 provides schedules of controlled substances as follows:

Establishment

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after October 27, 1970 and shall be updated and republished on an annual basis thereafter.

*****

Initial schedules of controlled substances

(c) Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

*****

Schedule II

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis: ...

> (4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves (including cocaine and ecgonine and their salts, isomers, derivatives), and salts of isomers and derivatives, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

(Pub.L. 91-513, Title II, § 202, Oct. 27, 1970, 84 Stat. 1247; Pub.L. 95-633, Title I, § 103, Nov. 10, 1978, 92 Stat. 3772; Pub.L. 98-473, Title II, §§ 507(c), 509(b), Oct. 12, 1984, 98 Stat. 2071, 2072.)

21 U.S.C. 841 provides (footnote omitted):

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; ....

Penalties

(b) Except as otherwise provided in section 845 or 845a of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a controlled substance in schedule I or II which is a mixture or substance containing a detectable amount of a narcotic drug other than a narcotic drug consisting of—

(I) coca leaves;

(II) a compound, manufacture, salt, derivative, or preparation of coca leaves; or

(III) a substance chemically identical thereto;

(ii) a kilogram or more of any other controlled substance in schedule I or II which is a narcotic drug;

(iii) 500 grams or more of phencyclidine (PCP); or

(iv) 5 grams or more of lysergic acid diethylamide (LSD);

such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $250,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 40 years, a fine of not more than $500,000, or both

(B) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A) and (C), such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than

$125,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $250,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(C) In the case of less than 50 kilograms of marihuana, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled usbstance in schedule III, such personal shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $50,000, or both. If any person commits such a violation after one or more prior convictions

of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $100,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

*****

(c) Special parole term

A special parole term imposed under this section or section 845 or 845a of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the

remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 or 845a of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

(Pub.L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260; Pub.L. 95-633, Title II, § 201, Nov. 10, 1978, 92 Stat. 3774; Pub.L. 96-359, § 8(c), Sept. 26, 1980, 94 Stat. 1194; Pub.L. 98-473, Title II, §§ 502, 503(b)(1), (2), Oct. 12, 1984, 98 Stat. 2068, 2070.)

21 U.S.C. 846 provides:

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the minimum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(Pub. L. 91-513, Title II, § 405A, as added Pub. L. 98-473, Title II, § 503(a), Oct. 12, 1984, 98 Stat. 2069.)

28 U.S.C. 2111 provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect substantial rights of the parties.
>
> (May 24, 1949, C. 139, § 110, 63 Stat. 105.)

Fed.R.Cr.Proc. 35 provides:

> (a) Correction of Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.
>
> (b) Reduction of Sentence. A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction of probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

Fed.R.Cr.Proc. 52 provides:

> (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Art. 2.12. V.A.C.C.P. (1983)

> The following are peace officers:
>
> ***
>
> (15) officers commissioned by a water control and improvement district under Section 51.132, Water Code.

Section 51.132, Texas Water Code (1983)

> (a) A district may employ and commission its own peace officers with the following limited powers:
>
> (1) make arrests when necessary to prevent or abate the commission of any offense against the regulations of the district and against the laws of the state when the offense or threatened offense occurs on any land, water, or easement owned or controlled by the district; or
>
> (2) make an arrest in case of an offense involving injury or detriment

to any property owned or controlled by the district.

(b) Peace officers employed and commissioned under this section must be certified by the Commission on Law Enforcement Officer Standards and Education under Chapter 546, Acts of the 59th Legislature, Regular Session, 1965, as amended (Article 4413(29aa), Vernon's Texas Civil Statutes).

Amended by Acts 1983, 68th Leg., p. 546, ch. 114, § 2, eff. May 17, 1983.